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No. 01-10873

SUPREME COURT OF THE UNITED STATES

October Term, 2001

KHANH PHUONG NGUYEN,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPY BRIEF

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CONTENTS

Reply to new points raised in brief in opposition 1

Conclusion 6

AUTHORITIES

Cases

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 2-3

Guam v. Olsen, 431 U.S. 195 (1977) 4

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 1

Peretz v. United States, 501 U.S. 923 (1991) 2

Ryder v. United States, 515 U.S. 177 (1995) 4

Constitutional Provision

U.S. Const. art. III, § 1 ..... *passim*

Statute

28 U.S.C. § 1291 4

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REPLY TO NEW POINTS RAISED IN BRIEF IN OPPOSITION

I

A pure legal question may be appropriate for the Court's resolution, nothwithstanding it was not addressed by the cou.:. of appeals. (*Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).) Whether the Ninth Circuit's judgment was vitiated by the participation of a non-Art. III judge is just such a question. Nguyen's petition

seeks the vindication of a right. At the same time, it invokes an exercise of the Court's supervisory powers. Insofar as it invokes an exercise of the Court's supervisory powers, that the issue presented for review was not raised in the court of appeals should be of no particular consequence. The Congress has authorized no judge other than an Art. III judge. The Ninth Circuit is designating *non*-Art. III judges. Clearly the practice should cease. Does the government suggest that the practice continue?

II

The government cites two cases in support of the proposition that Nguyen waived any right to a panel composed entirely of Art. III judges "by failing to object." (Brief for the United States in Opposition 5.) Both cases, however, entail much more than a mere failure to object. The waiver in *Peretz v. United States*, 501 U.S. 923 (1991), was unequivocal:

> At a pretrial conference attended by both petitioner and his counsel, the District Judge asked if there was "[a]ny objection to picking the jury before a magistrate?" App. 2. Petitioner's counsel responded: "I would love the opportunity." Ibid. Immediately before the jury selection commenced, the Magistrate asked for, and received, assurances from counsel for petitioner and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection. . . .
>
> . . . .
>
> . . . [P]etitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it.

(501 U.S. at 925, 932 (footnote omitted).) So was the waiver in *Commodity Futures*

Trading Comm'n v. Schor, 478 U.S. 833 (1986), unequivocal:

> The instant dispute arose in February 1980, when respondents Schor and Mortgage Services of America, Inc., invoked the CFTC's reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc. (Conti), a commodity futures broker, and Richard L. Sandor, a Conti employee. . . .
>
> Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in Federal District Court to recover the debit balance. . . . Schor . . . moved on two separate occasions to dismiss or stay the District Court action, arguing that the continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants in view of the fact that "[t]he reparations proceedings . . . will fully . . . resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action." App. 13. See also *id.*, at 19.
>
> . . . .
>
> . . . Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, see App. 13, 19 . . . .

(478 U.S. at 837-38, 849 (footnote omitted).)

III

The government contends that "it is debatable whether the separation of powers principles embodied in Article III apply to the residents of United States territories." (Brief for the United States in Opposition 6.) But how is residency relevant? The Ninth Circuit is not a territorial court. The separation of powers

principles embodied in Art. III are extended to the residents of Guam by 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the District Court of Guam . . . ."

IV

Nguyen's claim is not subject to the application of the de facto officer doctrine. Nguyen's challenge is constitutional. The issue presented for review is constitutional: "Was the Ninth Circuit's judgment vitiated by the participation of a non-Art III judge?" (Petition for Writ of Certiorari i.) Nguyen's argument is constitutional: "This Court should be reluctant to sanction the participation of a non-Art. III judge. (*Cf. Guam v. Osen*, 431 U.S. 195, 201 (1977)('we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law').)" (Petition for Writ of Certiorari 5.)

> In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), we declined to invoke the *de facto* officer doctrine in order to avoid deciding a question arising under Article III of the Constitution, saying that the cases in which we had relied on that doctrine did not involve "basic constitutional protections designed in part for the benefit of litigants." *Id.*, at 536 (plurality opinion).

(*Ryder v. United States*, 515 U.S. 177, 182 (1995).)

V

Of course the error affected Nguyen's substantial rights. Nguyen does not complain of an Art. III judge's *absence*. She complains of a non-Art. III judge's *participation*.

> Under Title XXIX, Government Code of Guam, section 28005, the disbarment or suspension of attorneys practicing law in Guam is vested exclusively in the District Court of Guam, consisting of a single judge.
>
> The proceedings which occurred at the court hearing indicate that the district judge understood this, and that he did not intend that the three judges then on the bench constitute the Appellate Division. He also made it clear that he "* * * assumed responsibility for any decision arrived at. * * *"
>
> Nevertheless two judges of the Island Court of Guam, neither of whom was attached to the personal staff of the district judge, were on the bench with the district judge, and at his request. They were not there merely as observers, or out of courtesy, but to assist the district judge, including the evaluation of evidence. Whether they actually did render any assistance to the district judge cannot be determined from this record; we must therefore assume that they did.
>
> There is no applicable statute, regulation or rule of court which contemplates such a procedure. . . .
>
> In our opinion, Webster was entitled to have the factual issues involved in these proceedings adjudicated, and the form of order to be entered determined, by the district judge without the assistance of persons not connected with his personal staff.

(*In re Webster*, 363 F.2d 837, 839 (9th 1966).)

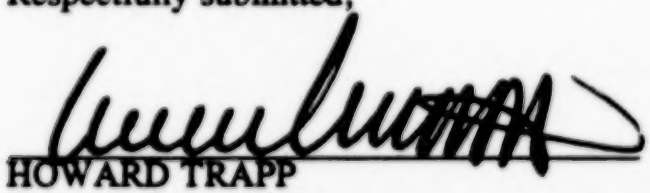
CONCLUSION

The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The panel which heard and determined Nguyen's appeal included a non-Art. III judge. Because of this, the petition for writ of certiorari should be granted.

Dated, Hagåtña, Guam,

October 28, 2002.

Respectfully submitted,



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